

John Kirk/Mellisa Donnes,
WADOE-CRO
15 W. Yakima Ave.. Ste.200
Yakima, WA 98902-3401

For Ecology Use Only
Received
Received
JUL 09 2012
Date Stamp
CENTRAL REGION OFFICE

**Benton County
WATER CONSERVANCY BOARD**

Record of Decision

Applicant: T&R Farms Application Number: CS3-22005C@3


The attached Report of Examination has been reviewed by the BCWCB members; and this Record of Decision was made at an open public meeting of the Benton County Water Conservancy Board held on July 2, 2012, with any changes to ROE/ROD based on information received from the applicant and WADOE staff.

(X) Approval:

The Benton County Water Conservancy Board hereby **grants** conditional approval for the water right transfer described and conditioned within the report of examination and submits this record of decision and report of examination to the Department of Ecology for final review or consideration.

() Denial:

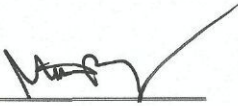
The Benton County Water Conservancy Board hereby **denies** conditional approval for the water right transfer as described within the report of examination and submits this record of decision to the Department of Ecology for final review or consideration.

Signed Original  Date: 7/02/2012
Darryll Olsen, Ph.D., Chairman
Benton County Water Conservancy Board

Approves
Denies
Recused
Abstains
Excused Absence

Signed Original _____ Date: 7/02/2012
Scott Revell, Appointed Board Member
Benton County Water Conservancy Board

Approves
Denies
Recused
Abstains
Excused Signature Per Training Requirement

Signed Original  Date: 7/02/2012
Matt Berg, Treasurer
Benton County Water Conservancy Board

Approves
Denies
Recused
Abstains
Excused Absence

Final ROE/ROD Mailed to the Department of Ecology, Regional Office of Ecology, via tracked mail, and other interested parties on or before 7/12/2012.



BENTON COUNTY WATER CONSERVANCY BOARD

Application/Review for Change/Transfer

OF A RIGHT TO THE BENEFICIAL USE OF THE PUBLIC WATERS OF
THE STATE OF WASHINGTON

Report of Examination

Prepared by Members of the Benton County Water Conservancy Board



Surface Water

Ground Water

DATE APPLICATION RECEIVED (March 2012)	WATER RIGHT DOCUMENT NUMBER CS3-22005C@3 CS3-22005C@2 (Existing)	WATER RIGHT PRIORITY DATE October 30, 1973	BOARD-ASSIGNED CHANGE APPLICATION NUMBER BENT-12-01
---	--	---	--

NAME
Attention: Ron & Reid Reimann, T&R Farms, 1120 Klundt Rd., Pasco, WA 99301

ADDRESS (STREET)	(CITY)	(STATE)	(ZIP CODE)
T&R Farms	1120 Klundt Rd., Pasco	WA	99301

Changes Proposed: ☐ Change purpose ☐ Add purpose ☐ Add irrigated acres ☒ Change point of diversion/withdrawal
☐ Other (Temporary, Trust, Interties, etc.) X Change to Place of Use, Add POD.

SEPA

The board has reviewed the provisions of the State Environmental Policy Act of 1971, Chapter 43.21C RCW and the SEPA rules, chapter 197-11 WAC and has determined the application is: ☒ Exempt (water right) ☐ Not exempt (proposed project)

The direct water right change/transfer described herein is exempt from SEPA review, as the water amount involved is under the SEPA threshold criteria.

BACKGROUND AND DECISION SUMMARY

Prepared by Members of the Benton County Water Conservancy Board

Existing Water Right

MAXIMUM CUB FT/ SECOND 31.34 cfs John Day Pool .34 cfs Ice Harbor Pool	MAXIMUM GAL/MINUTE	MAXIMUM ACRE-FT/YR 7,616 John Day Pool 80 Ice Harbor Pool	TYPE OF USE, PERIOD OF USE Seasonal irrigation of 2,308 acres, February 1 to November 30 John Day Pool Seasonal irrigation of 40 acres, February 1 to November 30 Ice Harbor Pool				
SOURCE			TRIBUTARY OF (IF SURFACE WATER) Mainstem Columbia River, John Day Pool and Lower Snake River, Ice Harbor Pool				
AT A POINT LOCATED: PARCEL NO. (See Attachments) Diversion Point(s): (and as described on permit)	¼ NE1/4 and Govt Lot 4	¼ NE1/4	SECTION 28 13	TOWNSHIP N. 5N 10	RANGE 25 EWM 32	WRIA	COUNTY. Benton Franklin
AND: 1) 600 feet south and 400 feet west from the northeast corner of Section 28, T.5N, R.25 EWM. 2) 1,165 feet east and 140 feet north from the SW corner of Section 13, T.10N, R.32 EWM.							
LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS USED All within: As stated on Existing Certificate/Change Order and attachment/map, and more specifically within: Sections 3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, T.5N, R.25 EWM and section 13 and 24, T.5N, R.24 EWM. (Parcel numbers on Attachment). And N1/2 of section 16, and E1/2 of section 20, and sections 21 and 28, all within T.10N, R.32 EWM.							

Proposed Use Under Change Application and Per Administrative Division

MAXIMUM CUB FT/ SECOND 27.43 cfs John Day Pool <u>Per Adm. Div.</u> 4.25 cfs Ice Harbor Pool	MAXIMUM GAL/MINUTE	MAXIMUM ACRE-FT/YR 6,666 John Day Pool <u>Per Adm. Div.</u> 1,030 Ice Harbor Pool	TYPE OF USE, PERIOD OF USE Seasonal irrigation of 2,308 acres, February 1 to November 30 John Day Pool <u>Per Adm. Div.</u> Seasonal irrigation of 1,450 acres, February 1 to November 30 Ice Harbor Pool				
SOURCE			TRIBUTARY OF (IF SURFACE WATER) Mainstem Columbia River, John Day Pool and Lower Snake River, Ice Harbor Pool				
AT A POINT LOCATED: PARCEL NO. (See Attachments) Diversion Point(s): (and as described on permit)	¼ NE1/4 and Govt Lot 4 (with Adm. Div.)	¼ NE1/4	SECTION 28 13	TOWNSHIP N. 5N 10	RANGE 25 EWM 32	WRIA	COUNTY. Benton Franklin
AND: 3) 600 feet south and 400 feet west from the northeast corner of Section 28, T.5N, R.25 EWM. 4) 1,165 feet east and 140 feet north from the SW corner of Section 13, T.10N, R.32 EWM.							
LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS USED							

All within: As stated on Existing Certificate/Change Order and attachment/map, and more specifically within:
 Sections 3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, T.5N, R.25 EWM and section 13 and 24, T.5N, R.24 EWM. (Parcel numbers on Attachment).
 And (with Administrative Division):
 N1/2 of section 16, and E1/2 of section 20, and sections 21 and 28, all within T.10N, R.32 EWM.

Water Board Decision with Administrative Division

MAXIMUM CUB FT/ SECOND 27.43 cfs John Day Pool Per Adm. Div. 4.25 cfs Ice Harbor Pool	MAXIMUM GAL/MINUTE	MAXIMUM ACRE-FT/YR 6,666 John Day Pool Per Adm. Div. 1,030 Ice Harbor Pool	TYPE OF USE, PERIOD OF USE Seasonal irrigation of 2,308 acres, February 1 to November 30 John Day Pool Per Adm. Div. Seasonal irrigation of 1,450 acres, February 1 to November 30 Ice Harbor Pool				
SOURCE			TRIBUTARY OF (IF SURFACE WATER) Mainstem Columbia River, John Day Pool and Lower Snake River, Ice Harbor Pool				
AT A POINT LOCATED: PARCEL NO. (See Attachments) Diversion Point(s): (and as described on permit)	¼ NE1/4 and Govt Lot 4 (with Adm. Div.)	¼ NE1/4	SECTION 28 13	TOWNSHIP N. 5N 10	RANGE 25 EWM 32	WRIA	COUNTY. Benton Franklin
AND: 5) 600 feet south and 400 feet west from the northeast corner of Section 28, T.5N, R.25 EWM. 6) 1,165 feet east and 140 feet north from the SW corner of Section 13, T.10N, R.32 EWM.							
LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS USED							
All within: As stated on Existing Certificate/Change Order and attachment/map, and more specifically within: Sections 3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, T.5N, R.25 EWM and section 13 and 24, T.5N, R.24 EWM. (Parcel numbers on Attachment). And (with Administrative Division): N1/2 of section 16, and E1/2 of section 20, and sections 21 and 28, all within T.10N, R.32 EWM.							

DESCRIPTION OF PROPOSED WORKS

The existing certificate is being used for irrigation of lands along the John Day Pool, Columbia River (Horse Heaven Hills) and the Ice Harbor Pool, Lower Snake River. The water right is in good standing.

The water right change reflects a portion of the existing water right—along John Day Pool—to be further transferred to the Ice Harbor Pool, Lower Snake River, for continued irrigation use. This change reflects a filed administrative division of the water right (see attachment).

The applicant seeks to increase the flexibility of the water right by transferring a portion of the right to a point of diversion to the Ice Harbor Pool, Lower Snake River (existing pump station site owned by the applicant), and to a place of use along the Ice Harbor Pool (owned by the applicant).

The applicant also will more efficiently apply existing water allocations to the new place of use based on the perfected allocations under the existing certificate.

DEVELOPMENT SCHEDULE

BEGIN PROJECT BY THIS DATE:

Immediately

COMPLETE PROJECT BY THIS DATE:

By January 1, 2016

COMPLETE CHANGE AND PUT WATER TO FULL USE BY THIS DATE:

By January 1, 2017

NOTE: The Water Board establishes the development schedule, as required under RCW 90.80.070, 90.80.080, and WAC 173-153-130. The schedule may be extended by WADOE if diligence is demonstrated in the completion of this project.

REPORT OF EXAMINATION

Prepared by Members of the Benton County Water Conservancy Board

BACKGROUND

A change/transfer application for certificate CS3-22005C@3 was received and accepted by the Water Board in March 2012, with further information provided during May-June. Beneficial use of the water right is based on a detailed audit review conducted in 2009 (electronic version provided to CRO Ecology staff).

The water change reflects that portion of the existing water right that is being acquired by the applicant for transfer to the Ice Harbor Pool. This transfer is similar to the change/transfer that occurred under CS3-22005C@2. Sandpiper Tree Farms is in the process of liquidating water and land assets from its John Day Pool operations.

The applicant requests changing place of use for the perfected water right, with no change to purpose or period of use, and using an already added point of diversion (per previous change decision). The applicant seeks greater flexibility in the use of the water right, and the change would be consistent with allowed use and changes under RCW 90.14.140 and 90.03.380.

The applicant's existing point of diversion is a pump station owned by the applicant; the new point of diversion would be located on the Lower Snake River (Ice Harbor Pool).

The existing water right is in good standing.

Attributes of the water right as currently documented:

Name on certificate, claim, permit: Note: Pending Administrative Division from Sandpiper Tree farm, LLC, to T&R Farms, Inc. (see attachments).

Water right document number: CS3-22005C@2

As modified by permit change number: CS3-22005C@3

Priority date, first use: October 30, 1973

Water quantities: Qi: 31.34 cfs, , John Day Pool; 0.34 cfs Ice Harbor Pool.

Qa: 7,616 acre-ft./year, John Day Pool; 80 acre-ft./year, Ice Harbor Pool.

Source: Surface Water, Columbia River Mainstem, John Day Pool; Lower Snake River, Ice Harbor Pool.

Point of diversion/withdrawal: See above and attachments

Purpose of use: Irrigation 2,308 acres, John Day Pool; 40 acres, Ice Harbor Pool.

Period of use: February 1 to November 30

Place of use: See above and attachments

Existing provisions: See attached permit

Tentative determination of the water right:

See Water Board's Decision Above; water right is in certificate stage, in good standing.

History of water use:

The permit/certificate has been used in conjunction with other water rights to serve irrigation lands in the Horse Heaven Hills and Ice Harbor Pool areas. The existing points of diversion serve multiple water rights.

Previous changes:

The original permit/certificate received previous changes and also has a pending administrative division.

SEPA:

As noted above, the water right change request is exempt.

COMMENT AND PROTESTS

Public notification for the applicant's request was filed in the Tri-City Herald. A copy is provided in the Public Notice attachments. The WADOE/Water Board did not receive a protest notice, or comments, from a third party. The application also received a public hearing from the BCWCB on June 14, 2012; no public comment received. The Benton County Commission was notified of the water right change/transfer outside of Benton County.

The application has been distributed to several state resources agencies, tribes, and interested parties. No comments have been received from these parties concerning the application.

Issues Raised by WADOE:

The Water Board has provided the WADOE CRO with the change/transfer application and public notice, and a Water Board representative has discussed in detail the change request with WADOE staff, and requested an explicit identification of any issues of concern related to the change request or the Water Board's preparation of the ROE/ROD.

As a third party acquiring a portion of the existing water right—separate from the water right conveyed to the applicant under an administrative division—the Department of Natural Resources (DNR) SE Region staff raised the question of the ACQ analysis used for the change/transfer. Consequently, a Water Board representative and WADOE staff have reviewed in detail the change request subject to RCW 90.14.140, 90.03.615, 90.03.380. There has been no formal DNR comment provided to the Water Board.

Per this review, the Water Board has made the determination that the full amount of the water stated in the Water Board Decision above is available for change/transfer, consistent with RCW 90.14.140, 90.03.615, and 90.03.380; and the amount available for change/transfer remains the same as that previously authorized under the BCWCB's ROE/ROD and WADOE's modification order issued for CS3-22005C@2. This determination is defined in depth below and within Attachment--ACQ Analyses Technical and Legal Features.

The Water Board and CRO-WADOE staff also have reviewed indirect comments with the Attorney General's Office and legal counsel opinions requested from the applicant by the BCWCB.

Protests:

Date: None Received.

This was recognized by the board as a ☐ Protest ☐ Comment

Name/address of protestor/commenter:

Issue:

Board's analysis:

Other:

INVESTIGATION

The following information was obtained from site inspections, technical reports and documents, research of department records, and discussions with the applicant's technical representative/consultant and other interested parties; as well as discussions with the CRO-WADOE staff.

Proposed project plans and specifications:

As noted above, the applicant will continue to use this water right at an existing/new place of use, with no change to the demonstrated beneficial use. The water right change/transfer will involve the use of one surface water pump station, already in existence.

The applicant's intent is to continue the use of CS3-22005C@3 at its proposed place of use, as described above.

A. Key Technical Issues—Water Right Review:

This investigation has included several issues:

Tentative Determination:

In order to make a water right change decision, the Water Board must make a tentative determination on the extent and validity of the right. The Water Board has made the tentative determination as displayed upon the first section of this report. There are several circumstances that can cause the Board's tentative determination to differ from the stated extent of the water right within water right documentation. Water right documents attempt to define a maximum limitation to a water right, rather than the actual extent to which a water right has been developed and maintained through historic beneficial use. Additionally, except for a sufficient cause pursuant to RCW 90.14.140, water rights, in whole or in part, not put to a beneficial use for five consecutive years since 1967 may be subject to relinquishment under Chapter 90.14.130 through 90.14.180 RCW. Water rights may additionally be lost through abandonment. The Board's tentative determination was based upon the following findings.

First, the water right applicant (owners) holds a valid water right certificate in good standing, and it is on file with the WADOE. The water right is subject to the surface water code provisions, including RCW 90.14.140, 90.03.615, and 90.03.380.

The certificate is valid as stands, subject to subsequent change actions by the Water Board and any WADOE administrative changes affecting development. Also, the current certificate is subject to an administrative division attached.

Second, the change/transfer request must be consistent with RCW 90.03.380, and related water code statutes 90.14.140 and 90.03.615. As discussed below, the Water Board has reviewed in detail this change/transfer per the applicable statutes and determined compliance thereof (see attachment).

Third, under the change request, the total amount of water withdrawal from the existing right and proposed change cannot exceed the amount within the currently certificated water right. The change/transfer request must not exceed the existing water right limits; no enlargement of the water right is allowed.

The Water Board notes that this request requires no Qa or Qi expansion of the water right, as designated under the existing certificate. The applicant is actively using the water right, taking into account development along with other nearby water rights, and the change request would not directly affect other water rights owned by the applicant (or STF).

Fourth, the allowed amount (baseline) of water available for change/transfer under RCW 90.03.380, is based on the annual consumptive quantity (ACQ) covering the most recent five year continuous use, two-year, peak-year average use, of the water right. An Attachment (ACQ Analyses) provides a more detailed discussion and history of the ACQ analyses, but in summary below:

- The STF baseline water right value available for change/transfer under CS3-22005@3 is determined to be (a portion thereof to be transferred per filed administrative division):
 - a. 31.34 cfs.
 - b. 7,616 acre-ft.
 - c. Seasonal irrigation of up to 2,308 acres, Feb. 1-Nov 30.

Incremental change/transfer amount to Ice Harbor Pool:

- a. 3.91 cfs.
- b. 950 acre-ft.
- c. No change to existing irrigated acres at John Day Pool; water duty per acre is reduced from existing water right, at John Day Pool.

The Water Board's determination for the annual consumptive quantity (ACQ) analyses, underlying the change/transfer decision for CS3-22005@3, is summarized by the following key points:

- First, The Water Board respects the legal principal of *res-judicata*, that applies equally to either an administrative or judicial proceeding, where full due process and review occur. The *Bugni* case well-asserted this principal in dealing with conditional final orders, the substantive equivalent of, and basis for, water right certificates (subject to adjudication).

As vested in the present question, the Water Board determines that *res-judicata* appropriately applies to the Water Board/Ecology decisions of November 2010/January 2011, where the ACQ analyses for CS3-22005@2 were fully review and accepted. Consideration for non-use for any period up to January 2011 is barred by administrative *res judicata*; thus restarting the non-use clock with the issuance of the Ecology modification order in January 2011—the new start date for issuance of a new superseding certificate. The current change/transfer decision (2012) represents “year two” of the non-use clock restart date.

- Second, pertinent to the above, one set of water code provisions should not be read in disregard for other primary water code provisions--the “splendid isolation” approach--but key provisions should be read

comprehensively. To the end, the Water Board does not abandon sections, or subsections, of RCW 90.14.140, or 90.03.615, when applying the ACQ analyses under 90.03.380.

The Water Board is highly familiar with the legislative action and water right holder concerns regarding the application of RCW 90.03.380, where the ACQ provisions within 90.03.380 principally exist to address the issue of impairment, not to function as an ancillary "tool" to further de facto (administrative) relinquishment of water rights, counter to fundamental protection granted under 90.14.140.

Third, the Water Board's determination further receives legal substantiation subject to the non-use exemptions under RCW 90.14.140 (and clarified under 90.03.650), affecting 90.03.380, where a fixed plan of determined future development overrides non-use factors. The Water Board concludes that the Report of Examination-ROD/modification order for the CS3-22005@2 certificate (in effect, the superseding certificate in itself) is the most pure form of a fixed plan of determined future development that exists. So being, any non-use after January 2011 is excused as a fixed plan of determined future development in play, now relevant for acknowledgement under the new change/transfer occurring per CS3-22005@3.

The end effect of the above is to defer to the non-use period prior to January 2011, a period that was adequately represented by ACQ analyses that were accepted by the Water Board/Ecology in the CS3-22005@2 decision. The ACQ review period being 2004-2008, and overlapping by three years a 2006-2010 period. Thus the ACQ for CS3-22005@3 should be based on the ACQ under CS3-22005@2.

- And Fourth, should others (not the Water Board) reject an objective, well-reasoned statutory interpretation of the water code, and instead succumb to an incomplete understanding of water code review, the "splendid isolation" reading of RCW 90.03.380 does cover the most recent five-year period for continuous use (2007-2011), that also covers the two-year, peak year average, over five years that is retained within the CS3-22005@2 ACQ analyses. This would be the 2007-2008 period.

So being, the CS3-22005@2 ACQ analyses directly carry-over (overlap) to the CS3-22005@3 analyses, even per an impaired, "splendid isolation" reading. The ACQ analyses results for both are empirically the same value(s).

And fifth, based on the above information and analyses (and Attachments), the Water Board has determined that the full amount of the said water right for change/transfer is presented within the above "Board Decision" summary, and should be the amount not exceeded by the applicant within the proof of appropriation filing and within the superseding permit/certificate issued by WADOE.

Hydrologic, and other technical investigations:

First, based on detailed technical review/discussions with CRO-WADOE staff, Ecology staff convey that the requested change/transfer will divert water from the same body of water (management area) as that allowed under the existing water right. An existing pump station will be used, located within the mainstem of the Lower Snake River, Ice Harbor Pool.

The WADOE has previously approved temporary and permanent change/transfers from the McNary-John Day Pools area to the Ice Harbor Pool (Lower Columbia Pools to Lower Snake River Pools). The Water Board acknowledges this WADOE administrative action and concludes that the current change/transfer is consistent in form and substance, with previous change/transfers. State and federal flow regulations have been previously reviewed with WADOE staff.

Second, the change request cannot create impairment. The Water Board has reviewed with the applicant information on potential impairment, along with the WADOE point of diversion and water right records (Columbia River Water Management Program mapping system), and concludes that impairment is not an issue for this change request. The point of diversion is consistent with the impairment standards under RCW 90.03.380, as a perfected water right.

Third, as a senior (pre-1980) water right, there will be no impairment to any other water right withdrawing water from the Ice Harbor-McNary-John Day Pools.

Fourth, it further is noted that:

- 1) For this immediate area, no record/affirmation of impairment has been noted by the Water Board or WADOE.
- 2) The Water Board has required the applicant to review impairment issues for the applicant's change request. This review indicates that the change action will not impair other water rights.
- 3) Based on the public notice of this change request, the Water Board has received no impairment issue comments from other existing water right holders, including those who divert water from sites within the Ice Harbor-McNary-John Day Pools.

And Fifth, the change will not increase water use relative to the existing allowed use, create impairment, or detrimental environmental impacts.

Given the above review, the Water Board concludes that the proposed action will not create impairment to other water rights per the provisions and conditions established under the existing permit and the conditions provided within this ROE/ROD.

Relative to the change request, the Water Board has previously evaluated extensive technical data and analyses related to any potential flow impacts affecting environmental resources, and determined that no empirically measurable, negative impacts will occur to environmental resources. This includes river hydrologic data, NOAA Fisheries flow-survival and river system survival data/analyses, University of Washington river system survival data, and data/analyses referenced by WADOE-sponsored studies.

B. Water Right Adjudication Process:

Water right adjudication does not affect this application.

C. Verification of Existing Water Right:

As noted above, the existing water use retains a certificate of water right granted by the Washington State Dept. of Ecology (and with re-assignment). The Water Board has reviewed the water right documentation, reviewed the applicant's technical information concerning the water right, is familiar with the existing water use and land operations, and has conducted its own review of the water right relative to change/transfer conditions as discussed above. It is concluded that the water right is in good standing, and subject to the conditions contained within this ROE/ROD for change/transfer.

D. Field Examination:

The field examination was conducted by Dr. Darryll Olsen, Chairman, BCWCB, with on-site visits during the months of May-June 2009, March-April 2010, and more recently during February-March of 2012. Further, the Water Board is familiar with this area having recently reviewed the area with the land owner and applicant.

The field examination confirmed the information within the application request and technical information, which is more fully elaborated upon in this Report of Examination.

The field examination consisted of viewing the existing/proposed water use sites, existing pumping site, and the surrounding area. A visual examination of the site water use area was conducted, along with a review of the applicant's maps. In essence, the field investigations confirmed information provided by the applicant through personal communications and supporting application materials.

E. Technical Information, Investigations, or Reports Reviewed:

The Water Board has reviewed the applicant's WADOE file and records contained therein, including any reports/comments submitted by WADOE staff, and pertinent WADOE water right records.

The applicant has provided technical information, personal communications, and technical references requested by the Water Board, including data to verify the existing and proposed use areas; and the applicant has communicated extensively with individual Water Board members to answer specific questions about the change/transfer request. The Water Board has conducted a field examination to verify the information contained within the applicant's current water rights and supporting technical information. The Water Board has requested and received supplemental information from the applicant and has discussed future water usage needs with the applicant.

The Water Board has reviewed the standing of the water right, documentation provided by the water right holder concerning land holdings and management, and aerial photography for the existing and proposed water right place of use and purpose.

The Water Board has forwarded copies of the application change/transfer request and public notice to the state Dept. of Fish & Wildlife, the Dept. of Health, the Tribes, and to all parties requesting such copies. No comments were received by these parties during the formal, and informal, public comment period for the change/transfer application.

The Water Board has reviewed this change request in detail with WADOE and Attorney General Office staff (concerning upstream changes under RCW 90.03.380). Informal discussion has been made with the AG's Office per the applicant's legal counsel.

The Water Board has reviewed the applicant's SEPA compliance needs.

F. Associated Rights and Uses:

Portions of water right CS3-22005C@2 have been changed/transferred.

The subject certificate is being beneficially used and developed, and it is being used along with several other water rights in the nearby area by the applicant (see attachments), as served by the existing Columbia/Snake River pump stations. The other water rights are not affected by the proposed change/transfer.

The Water Board has identified nearby water rights adjacent to the existing and proposed place of use, as indicated within the WRATS database; and identified nearby wells and surface water pump stations, as indicated on the WADOE website and data bases (and Columbia River Water Management data sites).

G. Review of Potential Impairment:

Because the proposed action will not increase the existing certificated water use (with change modifications), or increase the water amount put to allowed beneficial use, or likely affect other existing water rights (or applications

for new water rights), no impairment is perceptible. The applicant's technical information has been reviewed on water use within the same body of water for management purposes and potential impairment.

The proposed change/transfer will be beneficial in the conservation and management of water resources from existing practices for the following reasons: 1) there will be no increase in diversion/withdrawal on an annual basis after the change/transfer, compared to existing permitted withdrawals; and 2) better controls and monitoring on the quantity of water pumped will help ensure that the authorized quantity is not exceeded, as required under a metering and development plan.

The Water Board has published public notice of the proposed action and reviewed any potential technical issues concerning impairment.

Existing water rights located within the nearby area--within the same section and adjacent sections--were noted according to information contained within the WADOE WRATS data base system and visual inspection, and ongoing Water Board review within this area.

As noted above based on the applicant's technical information and the Water Board's review, it is concluded that no impairment would occur related to the water right change/transfer request.

The field investigation revealed that the applicant's request for change/transfer is consistent with existing land and water use practices within the immediate area, reflecting the development of and consistency with the Benton County Comprehensive Land Use Plan.

The change/transfer request is consistent with net beneficial use and return flow considerations contained in RCW 90.03.380 and other applicable statutes. The change will not increase water diversions or net depletions from the surface water source. More specifically, the subject application for change is consistent with public policy objectives of the state to provide for efficient use of water resources, to encourage supply of new or expanding uses through change/transfer of existing water rights, and to provide greater operational control to water managers.

Given the fact that no increase in water withdrawal from the existing surface water management source will occur relative to that permitted and allowed for beneficial use, there is no reason to expect any impairments to other water sources, consistent with the conditions and provisions provided under the existing water right modification order granted by the WADOE. Also, because the change/transfer proposed by the applicant does not affect withdrawals from new water sources—without regulation—or increase existing allowed net annual withdrawals/diversions from that currently permitted, the change/transfer request does not affect local conditions surrounding the status quo for water use, as permitted by WADOE.

This application decision has no impact on WADOE's existing water right decisions, the condition of local surface water or groundwater resources based on empirical data, or the priority for water rights between junior and senior water right holders within the local area. The Water Board does include conditions within this ROE to ensure that the public interest affecting water use is protected, and that they are consistent with actions that would be pursued by WADOE to avoid future or potential impairment problems or regulation actions.

H. Effect or Benefit to Public Interest:

A recent Washington State Supreme Court ruling has stated that "...a 'public interest' test is not a proper consideration when Ecology acts on a change application under RCW 90.03.380." PUD No. 1 of Pend Oreille County v. Dep't of Ecology, 70372-8 (2002). By extension, neither does the Water Board have authority to apply a public interest test when evaluating a change in water right request under RCW 90.03.380.

Nevertheless, the Water Board concludes that the requested change/transfer is not contrary to the public interest governing water use. To the extent review of public interest is applicable, the Water Board finds that the application for change is consistent with public policy objectives of the state to provide for efficient use of water resources, to encourage supply of new or expanding uses through change/transfer of existing water rights, to provide greater operational control to water managers, and to ensure no impairment exists.

Because the proposed action will not increase the existing allowed annual water use, or increase the water put to actual beneficial use, or result in an impact on other existing water rights or applications for new water rights, it does not negatively change the existing status quo for water use impacts. Thus, no impairment is perceived, because of the change/transfer requested in the application. Water use is provided consistent with statutory requirements for beneficial use.

The proposed action does provide for a continuation of the existing beneficial use as stated within the certificate of water right, increasing the economic benefits to the state and local area by allowing for continued use and development of irrigated lands. The development is taking place in the land-use management area of Benton County.

This action is consistent with the intent of RCW 90.03.380, and 90.80 (amended May 10, 2001) and other applicable statutes; and it is consistent with Benton County's Comprehensive Land-Use Plan. No impairment is consistent with the public interest; all pertinent water right issues are addressed above; conditions are recommended within this ROE to further protect the public interest consistent with state water law.

The application for change/transfer is consistent with the public interest requirements for beneficial water use, and consistent with the procedural, technical, and legal review requirements by the state.

I. Consideration of Pending Applications:

The applicant's request will not affect the priority for action on pending new water rights or change/transfer applications filed with the Washington State Department of Ecology, for Benton County. Existing applications for Benton County were noted (WADOE data base); and no infringement on priority for action for these applications is perceived by (WADOE or the Water Board).

This application review also is consistent with legislative changes made in 2001 affecting the processing of change/transfer applications by the WADOE, as well as the amendments made to RCW 90.03.380.

Public notice has been provided for requesting all water right holders within the Benton County to submit existing or new water right change/transfer applications to the Benton County Water Board—or the WADOE. Applications received by the WADOE or Water Board are first reviewed for accuracy, completeness, and purpose to ensure they fall within the purview of the agency's and Board's jurisdiction. Those that are found wanting are referred back to the applicant for re-submittal or withdrawal. The remaining ones are acted on by a first-come, first-serve basis, taking into account received application's priority date and the technical/legal review requirements thereof.

FINDINGS AND CONCLUSIONS

1. The certificate of water right and beneficial use are verified; the administrative division affecting this change/transfer is verified.
2. The proposed change/transfer will result in no increase in the annual quantity of water authorized and is consistent with the requirements of RCW 90.03.380, 90.14.140, 90.03.615 and the surface water code. The change/transfer request will not increase the allowed water right; the change/transfer will not increase allowed consumptive use from the designated sources, as allowed by the water code.

3. There will be no increase in water withdrawal on an annual basis. In addition, continued monitoring of the quantity of water pumped will help ensure that allowed water withdrawals are not exceeded, for the changes requested.
4. The Water Board has determined that impairment is not an issue affecting this change request; the change is within the same body of water for management purposes; and the use is allowed under RCW.90.03.380, 90.14.140, 90.03.615, and other parts of the water code.
5. Public notice has been provided for the proposed action, and any public concerns have been reviewed by the Water Board. Public notice and application submittal has been forwarded to several state resource agencies/tribes/interested parties for comment; the agencies have provided no direct comments to the application.
6. The Water Board has reviewed the proposed project for SEPA compliance.
7. The proposed action creates no perceived detrimental impacts or impairments to other water right holders or permit applicants; adequate data and information exists to make this determination with confidence.
8. No protests have been made by third parties on this application.
9. The proposed action is consistent with the intent of RCW 90.03.380, 90.14.140, 90.03.615, and 90.80 (as amended May 10, 2001) and recent case reviews by the Washington State Supreme Court.
10. The proposed action supports the public interest concerned with the direct use of water rights, is consistent with allowed beneficial uses, and is consistent with local area economic development needs and land uses.
11. The Water Board has provided for specific conditions and provisions affecting the use of the water right, as identified below.

RECOMMENDED PROVISIONS

A. Provisions:

The applicant's water right change for an added point of diversion and place of use are conditioned by the following provisions:

1. The place(s) of use for the water right is designated in the summary table above (under Water Board Decision).
2. The point(s) of diversion is designated in the summary table above (under Water Board Decision).
3. Use of water under this authorization shall be contingent upon the water right holder's utilization of up-to-date water conservation practices, and taking into account cost-effectiveness for operations and economic viability.
4. Per an administrative division of the water right, the issued superseding permit for CS3-22005C@3 shall not exceed from John Day Pool service 27.43 cfs, 6,666 acre-ft. annually, for seasonal irrigation use, 2,308 acres, February 1 to November 30; and from Ice Harbor Pool service 4.25 cfs, 1,030 acre-ft., annually, for seasonal irrigation use, up to 1,450 acres, February 1 to November 30.
5. By January 1, 2016, the applicant will notify the Water Resources Program, Central Region Office, WADOE, that project construction is completed, unless further extended for good cause.

6. Proof of appropriation (for actual beneficial use of water) is due to the Water Resources Program, Central Region Office, WADOE by January 1, 2017, unless further extended for good cause.

7. The WADOE shall undertake a proof inspection to certify actual development of the water right amended within this ROE.

8. The applicant will provide the WADOE with measured water use data, for the existing and new place of use, consistent with the provisions of this change decision. The metered or measured data will ensure that water usage will not exceed authorized amounts, as well as that within adjacent water rights used at the existing points of diversion.

9. An approved measuring device(s) shall be installed and maintained for the sources (all points of diversion) identified herein in accordance with the rule "Requirements for Measuring and Reporting Water Use", Chapter 173-173 WAC.

Water use data shall be recorded weekly and shall be submitted annually to Ecology by January 31st of each calendar year typically.

10. The rule above describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition Ecology for modifications to some of the requirements. Installation, operation and maintenance requirements are enclosed or available from Ecology as a document entitled "Water Measurement Device Installation and Operation Requirements."

11. At a minimum, the following information shall be included with each submittal of water use data: owner, contact name if different, mailing address, daytime phone number, WRIA, Permit or Certificate No., source name, annual quantity used including units, maximum rate of diversion including units, period of use, weekly meter readings including units, and peak flow including units for each month. In the future, Ecology may require additional parameters to be reported or more frequent reporting.

12. Ecology prefers web based data entry, but does accept hard copies. Ecology will provide forms and electronic data entry information.

13. Department of Ecology personnel, upon presentation of proper credentials and prior notification, shall have access at reasonable times, to the records of water use that are kept to meet the above conditions, and to inspect at reasonable times any measuring device used to meet the above conditions, but only to the extent otherwise allowed by law.

14. At the pump diversion sites, the applicant shall install and maintain water intake screens complying with standards prescribed by the Washington State Dept. of Fish and Wildlife.

B. Mitigation Requirements:

None are required.

DECISION

Approvals:

The Benton County Water Conservancy Board hereby APPROVES the water right change/transfer described within this record of examination and record of decision, and submits this certificate for conditional approval to the Director of the Washington State Department of Ecology. If the Director takes no action within forty-five days of receipt of this ROE/ROD, then the Water Board's decision, as written, is final.

Approved Unanimously by the BCWCB
Kennewick, Washington
This 2th day of July 2012

Approved and Signed on Behalf of the Water Board By:

Signed 

Darryll Olsen, Ph.D., Chairman
Benton County Water Conservancy Board

Date Mailed to WADOE Director: on or before 7/12/2012